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E.L. Schoenhals; Attorney for AppellantE.J. Skeen; Attorney for Plaintiffs and Respondent Salt Lake City, Utah

Recommended Citation
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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
MAY 18 1966
Clerk, Supreme Court, Utah

MERVIN J. RUSSELL and
ADA J. RUSSELL, his wife,
Plaintiffs,

vs.

GEYSER-MARION GOLD
MINING COMPANY, a
corporation, The BOTHWELL
CORPORATION,
a corporation, et al,
Defendants.

Case No.
10577

APPELLANT'S BRIEF

Appeal from Judgment, District Court,
Tooele County
Honorable R. L. Tuckett

MARK & SCHOENHALS
E. L. Schoenhals
903 Kearns Bldg.
Salt Lake City, Utah
Attorney for
Defendant and Appellant

E. J. SKEEN
Attorney for Plaintiffs and Respondent
Salt Lake City, Utah

UNIVERSITY OF UTAH

JAN 13 1967

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COLOR RED = MINERAL RIGHTS
COLOR GREEN = SURFACE & WATER RIGHTS
COLOR BLUE = LICENSE TO GRAZE

Ex. 15 or Abstract as of 6/6/32 shows Fee Simple Title in Jorgensens

June 7, 1932 Only Mineral Rights Granted Geyser-Marion

Abstract Entry 103 Grant to

Jorgensen's First Grant
"Subject to reservations in Grantors of all surface rights including existing springs and surface waters"

Jorgensen's Second Grant
Glen R. Bothwell, Grantee
Entry 106 Ex. 2 May 24, 1934
Grantee agrees Grantor right to use surface for grazing purposes:
1. Not to interfere mining.
2. Grantor to pay ½ general taxes.

Contract rights only remaining in Jorgensens

Entry 117 Ex. 3 1938
Decree of Distribution to Legatees of Glen Bothwell.

Jorgensen's Third Transfer (1939) to A. C. Nordell Note "only grazing rights." Entries 110,111,112 A. C. Nordell

Merger of Mineral and surface in Second Grant to Geyser-Marion Grantee acquires all rights under Ex. 2

Entry 119 Ex. 4 1938
Grant to Bothwell Corporation

Entry 154 Ex. 5
Recorded 1949 Bothwell Corporation Grants to Geyser-Marion

1945 Castagno

December 14, 1960 Castagno to Russell Plaintiff

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TEXTS AND CASES CITED

STATUTES CITED

LEGEND

1. All references such as T273-3 refer to transcript page ....., line 3.
2. Emphasis — all supplied.
3. R ..... = record with number as placed thereon by County Clerk.

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IN THE SUPREME COURT
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STATE OF UTAH

MERVIN J. RUSSELL and ADA J. RUSSELL, his wife, *Plaintiffs*,

vs.

GEYSER-MARION GOLD MINING COMPANY, a corporation, The BOTHWELL CORPORATION, a corporation, et al, *Defendants*.

Case No. 10577

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

Plaintiffs respondents claim title to grazing rights through conveyance and also by adverse possession, of the mining claims here involved.

Defendants claim by deed and to be record owners in fee simple of all mineral, surface, and grazing rights of all mining claims, and also assert that any claims of plaintiffs are barred by limitations and latches and all rights are established in defendants under the statutes and as record owners. Defendants further assert that all rights that existed in plaintiffs' predecessors were at most an assignable license, which rights were abandoned,

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extinguished and never asserted after 1944, and that defendants have had exclusive possession of and paid all taxes assessed on all mining claims involved since 1934.

DISPOSITION IN LOWER COURT

The lower court found for plaintiffs and that their predecessors for many years had grazed said mining claims and retained title to use the surface for grazing purposes upon payment of one-half of all future general taxes. Said decision was bottomed upon the conveyance of May 23, 1934, Ex. 2. The decree further provided that the rights of plaintiffs to quiet title are not barred by statutes plead or any other statute of limitation, and in equity enjoined defendants from interfering with the same.

RELIEF SOUGHT ON APPEAL

Since the court's decision sounds in equity, and it is the prerogative and the duty of the appellate court to review both the law and the facts, defendants request the court to review the law and the evidence and reverse the lower court with a mandate that judgment be entered for defendants and against plaintiffs with costs to defendants.

UNDISPUTED FACTS

The Abstract of Title, Ex. 15, shows that the Jorgensens were the owners in fee simple of all of the mining claims here involved prior to June 7, 1932. In the conveyance called the first grant of June 7, 1932 from Jorgensens to defendant and

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appellant, Geyser-Marion Gold Mining Company, the following is recited:

> "This grant is made subject to a reservation in the Grantors of all surface rights, including existing springs and surface waters in and upon said claims."

Thereafter, on May 24, 1934, the Jorgensens or the same Grantors, by another conveyance called the second grant, conveyed to Glen R. Bothwell all of the mining claims conveyed in the former conveyance of June 7, 1932 and also other mining claims, the aggregate of which constitute all mining claims involved in this litigation. In the second grant dated May 24, 1934 and recorded May 31, 1934, Ex. 2, and abstract entry 106 no such words as "subject to reservations" or "with reservations", appear, and said conveyance, Ex. 2, after describing said claims contained the following:

> "The Grantee herein agrees that the Grantors shall have the right to use the surface of the ground for grazing purposes, the grazing to be done in such a manner as not to interfere with any mining that the Grantee elects to do. The Grantors agree to pay one-half the general taxes assessed against the land, as long as it is not used for mining purposes."
>
> "This deed is intended to convey any after acquired title obtained by the Grantors."

The estate of Glen R. Bothwell or said grantee under said second grant was probated and all rights he had under said second grant, Ex. 2, were distri-

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buted to the legatees named in his estate as is shown in the Decree of Distribution, Ex. 3. See also Entry No. 117 of the Abstract. Thereafter, said legatees conveyed all of said mining claims to the Bothwell Corporation, Ex. 4. Abstract Entry 119. Thereafter, the Bothwell Corporation conveyed all of its interest obtained under the second grant in all of said mining claims to defendant and appellant, Geyser-Marion Gold Mining Company. After recording Ex. 5 supplemental Abstract Entry 4, Geyser-Marion had all interests conveyed under both the first and second grant. The exhibits show that all deeds were recorded. Subsequent to the recording of both the first and second grants aforesaid, the Jorgensens by a third transfer transferred only "the grazing rights upon the following described lands" to A. C. Nordell. See Abstract Entry No. 110, 111, and 112. Nordell grazed livestock on said claims and paid one-half the general taxes thereon to defendants for the years 1942, 1943, 1944. See Ex. 7, 8, 9, 10 the original book entries, and Requests for Admissions for checks from A. C. Nordell's checking account and T259-15. Nordell transferred the interest he had in said property to Tony Castango in 1945. Abstract Entry 154.

Castango transferred to Rose Castango in 1960 Ex. 22. Rose Castango's interest was transferred to the Russells, the present plaintiffs, in 1960, supplemental Abstract Entry 6. The outline attached to the first page of the cover outlines said transfers.

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Herein, Geyser-Marion Gold Mining Company and its predecessors in interest shall be referred to as defendant or Geyser-Marion and present plaintiffs, Russell, and plaintiffs' predecessors in interest shall be referred to as plaintiff.

The mining claims involved in the litigation amount to about 608 acres. From and after 1944 Owen Ault grazed livestock on and leased all of said mining claims from and paid rental to defendant each and every year until the commencement of this action. Ex. 14 is the lease betwen Geyser-Marion and Owen Ault involving the period immediately preceding the filing of this action. Ex. 11, 12, 13 show the payment of rental by Ault to defendant and Ex. 25 is the receipts and checks for rental payments on said claims which Ault produced under subpoena. Said lease, Ex. 14, contains about 2,200 acres, which defendant leases to Ault. Only 608 acres are involved in this litigation, they being mixed in among the other 1,500 acres, and some being southwesterly of Mercur and the others being scattered among the said 1,500 acres in the vicinity of Mercur, see Ex. 19. Ault also leased about 400 acres of mining claims from Gover Gold Mining Company and about 480 acres of mining claims from McCormick T204-1. The aggregate acreage of mining claims leased by Ault was about 3,080 acres forming the solid area colored in green on Ex. 18, 203-28.

Mr. Roy Bothwell is and has been the presi-

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dent and director of defendant, Geyser-Marion since 1942, T136-17, and had handled matters of the company in dealings with Mr. Ault who leased the mining claims involved in this litigation from Geyser-Marion. Ault testified that he presumed the Bothwells owned the Geyser-Marion claims, T152-12. Ault testified that he ran livestock on said mining claims every year without missing a year since 1944 or 1945 and that he has never missed a payment for the leasing of said claims, T154-9, and Castango admitted Ault grazed same, T46-27, T-48-8, T53-26 as also did Russell, T26-1.

T136-5 is further varification that Ault paid the money to Bothwells as are the records produced by Bothwell, president of Geyser- Marion, Ex. 11, 12 and 13. See also T204-19 and also Ex. 25 containing the checks and rental receipts produced by Ault under subpoena.

Ault ran 1,400 head of shep on said claims for 20 years, T146-11.

Ault stated he ran 40 head of cattle on said claims since 1945, T159-1 to 4.

Exhibit 18 is the personal map owned by the lessee, Ault, which he produced under subpoena in court, T24-20.

Ault spent all of his time in said area for 20 years, T145-27.

To color the map, Ex. 18, Ault took the claim

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numbers from the leases and located said claims physically on the ground by blazes on trees and monument numbers and colored the area in green on Ex. 18, his map, T148-24.

All facts above related are undisputed, with no evidence to the contrary.

ARGUMENT ON THE FACTS

POINT I.

WHERE EVIDENCE IS CONTRARY TO THE FINDING OF THE COURT PLAINTIFF FAILS IN BURDEN OF PROOF AND DEFENDANT PREVAILS PARTICULARLY IN AN EQUITY CASE.

From the entire period from 1944 to 1957 Tony Castagno is the only predecessor, through which plaintiffs must prove possession or the grazing of said mining claims or any rights with respect thereto. Castagno admitted that he had never tried to locate a mining claim and could not locate a claim, and on direct examination for plaintiffs' case, testiied as follows:

> T45-30 Q. Mr. Castagno, are you acquainted with the general location of the mining claims described in the deed I showed you on the ground?
>
> A. Well, I couldn't point them out just where they was, no."

Despite the fact that plaintiffs' proof failed to show the grazing of a single mining claim for even a day from 1945 to 1957, their case was even weaker after cross examination since Castango did not even

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know which mining claims were involved in this litigation.

Castagno also indicated that he couldn't tell if he was trespassing and could not identify where any particular claim was.

> T 56-4 Q. "I ask you a question. I want you to answer it, Mr. Castango, as to whether or not you personally took a map and identified any one of these claims?
>
> A. No.
>
> Q. But you didn't take a map and try to identify where these particular claims were?
>
> A. No.
>
> Q. You knew, did you not, that some of these trees had blazes on them with numbers on them?
>
> A. Yes."

T 91-29 When asked whether his cattle were on Gold Coin, he claimed they were, and when it was pointed out to him that Gold Coin claims were not involved in this litigation, and he was asked to name a single claim involved in this litigation and he stated that he could, he named Gold Bug, and Gold Bug is not a claim involved in this litigation T 92-22.

> Q. "You don't know whether your cattle were on the Heclas or not do you?
>
> A. No I don't."

The Heclas, constituting a group of five mining

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claims, was the largest area of claims (just north of Mercur) involved in this case. The witness was then asked:

> T92-25 Q. "Alright, you can't identify a single claim's name that your cattle were on, can you?
>
> A. Yes.
>
> Q. Which one?
>
> A. Gold Bug.
>
> Q. Gold Bug?
>
> A. Yes.
>
> Q. The Gold Bug isn't even involved in this litigation.
>
> A. It sure is."

Actually the Gold Bug claim is not involved in this litigation as disclosed from the pleadings. Castagno also indicated he did not know where any particular claim was or whether he was trespassing, T91-24. The questions and answers demonstrate that the witness did not even know what mining claims were involved in this litigation much less their location or whether he had grazed any of them.

From 1957 to 1960 Rose Castagno was the immediate predecessor to plaintiff. Rose Castagno was even more confused than was Tony Castagno. She did not even know where the claims were located with respect to Sparrow Hawk Spring or the Milk Ranch, T62-6. She did not even know where the grave yard was, which was identified as being on

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the northeast edge of the lower group of claims, T64-14.

Plaintiff, Russell claimed he started grazing in the spring of 1961, T25-16. Russell had no map to identify where the mining claims were. T35-20. He never did locate any particular claim, T36-1. He admitted that he knew that Ault's livestock had grazed the area where he purportedly thought said mining claims were located for a period of ten years, T14-9. He also admitted that he knew that Ault had been operating sheep in the area for up to 20 years,T13-28, and he knew that Ault leased from the Bothwells, T14-27.

Under all of plaintiff's evidence there was not a scintilla of evidence to show that any particular claim had ever been grazed in any particular single year or for any period, even one day. Yet the lower court found:

> "3. For many years last past plaintiffs and their predecessor in interest have used the surface of said mining claims for livestock grazing."

The evidence is conclusive that Ault, defendant's lessee, had exclusive possession of and grazed all of said mining claims from and after 1944.

Ault claimed that he never at any time had any interference by Castagno in grazing said claims, T155-30.

The defendant Russell under his testimony claimed that subsequent to 1961 he grazed part of

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the claims in common with Ault; however, the transcript discloses the following evidence from Ault: T155-30

> Q. "Did Mr. Castagno ever run any sheep or cattle on any of the claims that you were leasing from Bothwell?
>
> A. Never run any sheep on there that I know anything about.
>
> Q. Never had any sheep on any of them?
>
> A. No."

Mr. Mervin Russell plaintiff testified that he ran sheep in common with those of Ault and Ault upon being cross examined by counsel as to whether or not Russell ever had any livestock on said claims Ault answered:

> T 199-84 "There has been no sheep in there outside of mine at no time.
>
> Q. You are positive of that?
>
> A. I am positive of it."

Moreover, Ault's cattle consumed all of the growth available for grazing and he observed it and so testified, T167-5 and testified that only his cattle had been in the area since 1944, T167-19.

The Mercur Bench area is where the lower group of mining claims are located and when Ault was asked whether he had seen anybody's cattle on this lower group of claims since 1945, he testified that he had not,T170-21 to 28. When he was speci-

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fically asked whether he had seen Castagno's or Russell's cattle up by Sparrow Hawk or near the northern groups of claims in connection with the water that was used and he indicated he had not and that no one had interferred with same, T-159-18.

Ault stated he built a reservoir about seven years ago near the Sparrow Hawk Spring which spring is shown on Ex. 19 as being on the south easternly portion of the Black Shale claim involved in this litigation, and it was not disputed that there was not water in the water trough by said spring, Castagno T278-18, Ault T235-30, except as turned therein through the pipe.

Ault indicated he leased said mining claims every year since 1944, ran sheep on them and paid rental for the use of said claims, and that he never missed a payment on said lease, T154-9; and that prior to the commencement of this action he never complained aobut anyone else using said claims, T155-17; and prior to 1964 he never complained to the Bothwells about Russell trespassing, T155-19; and he never complained to Bothwell about Castagno trespassing, T155-28; and that Castagno never ran any cattle on any of the claims he was leasing from Bothwell, T155-30. After Ault built the reservoir no one elses cattle used the same, T158-16. Russell could not get in to use the Hecla claims or the Mary Jean claims or the Douglas claim without trespassing on other claims leased by Ault,

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T161-9. Neither Russell nor the Castagnos ever grazed said claims, T161-18. Ault had no trouble with either Castagno or Russell running their sheep north of Mercur, T167-2, and no one else ever ran any livestock near the Milk Ranch since 1944, T167-19. Ault leased the mining claims known as the Milk Ranch since 1944, T168-4. Milk ranch was on claims Ault leased but not involved in this case and was west of the Hecla group see Ex. 18, and T156-9. Ault was in the area during the grazing seasons several times a week, T168-24. No cattle excep Aults were near the Heclas, T170-14 since 1945, T170-24. Ault visited the spring near Sparrow Hawk nearly every day, T180-27, and he examined the area and found that no cattle had ever watered there except his own, T179-26. All of the water that left the spring was contained within a pipe and none escaped, T192-22. They had a big box with a lock and a key where they could turn the water out, T224-30, and all of the water ran to Mercur, T234-12; Ault passed the area practically every day, T181-21. Ault claimed that no other cattle had ever been in the Milk Ranch area T198-21, and he was positive of it, T199-8.

All water at Sparrow Hawk Spring flowed into a pipe and all of it went to Mercur and the water had to be turned out of the pipe to put any water in the trough or in the reservoir, T193-14. There was a box over the spring which had to be unlocked to control or release any water, T224-27. No water

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flowed out of the mine and was all contained within the pipe, and was turned out of the pipe into the trough, T196-2, and was all under Bothwell's or Ault's control.

Ault was at the reservoir almost every day and there was no evidence that anyone else even used the water that he placed in the same, T222-17, and no livestock but his own used said reservoir, T179-30, as was disclosed from his visits practically every day, T-180-27.

A son of Ault's herded sheep for him for about 20 years, T283-20 between Sunshine Canyon and the grave yard which included all of the mining claims in the lower group which made a complete circle for grazing as is shown colored green on Ex. 18, and (Ault's son) never saw any of Castagno's sheep in said area at any time, and he grazed Ault's sheep there, T284-17, until all of the feed was gone, T284-18. Mrs. Ault, the wife of lessor, had knowledge of Aults sheep grazing there and hauled water into this area to water the sheep, T213-19 and had personal knowledge of her husband placing sheep on the southern area of claims, T214-20 and on the Black Sheep claim T230-18, and knew that her husband had had sheep in Mercur Canyon since 1922, T-224-5, and Ault himself had never seen any other livestock on the Mercur Bench area or the southern group of claims, T170-22.

The claims were even named that were involved

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in this litigation and Ault was asked if he had seen any persons cattle or sheep on any of said claims or on any of the land marked in green on Ex. 18 and he stated that he saw neither sheep or cattle grazing said area, T159-21 to 30, T160-1 to 10.

Again these specific questions were asked Ault whether or not he had seen Russell or any of his herds try to graze the Heclas or any of the group marked in red on Ex. 19 and he stated he had not T161-18. Ault was asked if it was necessary for others to trespass on other claims Ault leased in order to graze the Hecla claims. He replied they had to trespass, T161-9.

Since the court in equity reviews the facts as well as the law, counsel takes the position that plaintiff has not only failed to carry the burden of proof but the evidence is conclusive that defendant Geyser-Marion has exercised complete exclusive control and possession of all claims involved in this litigation through its lessee Ault since 1944.

Respondent did introduce some evidence of cattle being near Milk Ranch, no year was stated, and Milk Ranch area is 3 miles from the lower groups of claims and a mile and a half from Black Shale Claim in the upper group, and not adjacent to or near any claim involved in this litigation, T156-9 and see Ex. 18.

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ARGUMENT ON THE LAW

POINT II.

GENERALLY THE INSTRUMENT IS CONSTRUED IN FAVOR OF THE GRANTEE. AND FEE SIMPLE TITLE IS PRESUMED TO HAVE PASSED TO GRANTEE.

The fore part of this point is copied directly from *Meager vs. Uintah Gas Co.*, 255 P 2d 989, 123 U 123. In the Meager case, the Supreme Court of Utah quotes 16 Am Jur 530; 23 Am Jur 2nd has since superceded 16 Am Jur, and the following quotes appear to show the recent trend to resolve *all* doubts against the Grantor, and to transfer the largest interest Grantor could convey:

> 23 Am Jur 2d 212 Para. 165 CONSTRUCTION IN FAVOR OF GRANTEE
>
> "Most courts agree that if there is any ambiguity rendering a deed subject to alternative constructions, that construction will be adopted which is more favorable to the Grantee than to the Grantor, all doubts being resolved against the Grantor. This rule of construction is particularly applicable to avoid limitations on the grant, restraints upon alienation, or to prevent an unreasonable result. It is made statutory in some jurisdictions.
>
> The rule is predicated upon the reasoning that since a grant is expressed in words of the Grantor's own selection, it is, prima facie ,an expression of his intention, and he is therefore chargeable with the language used. If, therefore, the deed can inure in different ways, the Grantee, it is said, may take

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it in such way as will be most to his advantage. Thus, where ambiguous or uncertain in such respect, a deed is usually regarded as conveying the largest interest which the Grantor could convey."

The Grantors by the first grant were very articulate and reserved the surface and water rights. However, under the second grant Ex. 2, Grantors granted and vested all interest in all mining claims in said Grantee. This was done in the fore part of the deed. Thereafter, having intended that all of the interest was vested in said Grantee, the Grantor, without using words of "reservation" or "subject to" or like words intended to limit the grant;

The second grant contained the following words:

"Grantee agrees that Grantor shall have the right to use the surface of the ground for grazing purposes."

This shows no intent to limit the grant or reserve any right. Neither does it show said license was a perpetual license.

This further demonstrates that the intent of the parties was that the Grantee be vested with all of the title without limitation since Grantee would be powerless to make an agreement with respect to property Grantee did not own. After having received title without limitation Grantee could only then agree to the Grantor's right to use, the same and only on certain conditions.

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Section 57-1-3 U.C.A. 1953 provides:

> "A fee simple is presumed to be intended to pass by conveyance unless it appears from the conveyance that a lesser estate was intended."

It does not appear from the instrument, Ex. 2, that a lesser estate was intended.

The Supreme Court of the State of Utah in *Hanes vs. Hunt*, 85 P 2d 861, made the distinction between a limitation upon a grant and a mere license. The court states:

> "The deed to Hunt also contained a clause, 'Reserving and excepting unto the grantor' the grazing rights and the use of the water for watering livestock. A reservation and exception from a grant is persuasive that the grant was more than a license."

Even where the words reserving and excepting grazing and water rights are used the court indicates it is only persuasive that the grant was more than a license. It would therefore appear that the absence of the use of the words reserving and excepting with no water would indicate that it was a license.

In the case at bar while there was such limitation upon the first grant, there was no such limitation upon the second grant.

There was such a limitation upon the grant in the first deed, and in 1936 before the Geyser-Marion acquired the grant of the additional rights under Ex. 2, it brought an action to quiet title with

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respect to only one of the claims involved in this litigation. Since Geyser-Marion had not at that time acquired the enlarged interest under the second grant, recognition of the second grant by Jorgensens to Bothwell is shown in said decree by the fact that the administrator of the Bothwell estate is made a party to the action and rights *reserved* in the first grant were not awarded to Geyser-Marion. This was because Geyser-Marion did not receive the enlarged rights under the second grant until a number of years after the said decree had been entered.

Counsel for plaintiffs overlooked the fact that when Geyser-Marion commenced said action that Geyser-Marion had not at that time acquired said rights under the second grant, Ex. 2 when counsel claimed it supported his cause in the lower court.

Continuing on in the habendum of Ex. 2 in the case at bar the following is contained:

> "The grazing to be done in such a manner as to not interfere with any mining that the Grantee elects to do."

Roberts vs. Lynn, 73 N.E. at 524

> "The question there, and in the case now before us, is decided by determining whether, as matter of construction, the contract gave the other party exclusive possession of the premises against the world, including the owner, or gave him a license to occupy under the owner, in which case the rights of the other party rest in contract."

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Tips vs. U. S., 70 F 2d 525:

> "A mere permission to use land, dominion over it remaining in the owner and no interest in or exclusive possession of it being given, is but a license. 35 C. J. Landlord & Tenant Para. 10."

Since in the case at bar the defendant had the right to mine and oust plaintiffs from the use of the area being mined, said plaintiffs have only a contract or license and not such an interest in land as will support a quiet title action.

Saxman vs. Christmann, 79 P 2d 520:

> "It is said in 17 Ruling Case Law 568, Para. 81:
>
> 'Whether an instrument is a license or a lease depends generally on the manifest intent of the parties gleaned from a consideration of its entire contents.'
>
> Tested by this rule, there can be no question but that this permit is only a license to use the land. The rule applicable to this permit is well stated in 17 Ruling Case Law 570, Para. 83, as follows:
>
> 'A clearly defined distinction is drawn by the authorities between agreements which create a lease of the land for mineral purposes and those which are simply a license giving to the licensee authority to enter and operate for minerals. While under a lease an interest or estate in the land itself is created, under a license the licensee has no interest or estate in the land itself, but only in the proceeds, and in such proceeds, not as realty,

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but as personal property, and his possession is the possession of the owner. In general, a contract simply giving a right to take ore from a mine, no interest or estate being granted, confers a mere license, and the licensee acquires no right to the ore until he separates it from the freehold. * * *' "

In the case at bar the only right that the plaintiffs had was the right to remove the forage from the surface and no other. The evidence shows all available water was used by Ault and none by plaintiffs. Not even the use of the springs which were controlled with a key. In the first grant Grantor was very articulate and reserved the right to the surface water and the springs and thereafter the same grantor made a second grant containing the words "agreement" expressing the intent that it constituted but an agreement and used the word "use" signifying a license rather than a sole occupancy and specifying only grazing purposes subservient to (the main purpose of said land in the minds of the parties,) to-wit: mining purposes. This all gives strength to the position that having made a second grant, grantor was not doing a useless act but was parting with something retained under the first grant to-wit: all surface rights. The words used in the second grant are consistent with the conveying of all surface rights with only a conditional license or contract. This is true without relying upon the presumptions of the common law or 57-1-3

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U.C.A. 1953 which compel construing the same against grantor, and conveying all interest or the fee.

POINT III.

A SUIT TO QUIET TITLE MUST BE SUPPORTED BY AN INTEREST IN LAND AND IS NOT THE APPROPRIATE REMEDY UPON A CONTRACT OR TO ENFORCE RIGHTS UNDER A LICENSE.

Saxman vs. Christmann, 79 P 2d 521 the case quoted above where the party could remove minerals supports this point, and the court held:

> "Of course the defendant under the use permit has rights that the law will protect, but her rights are not such as to entitle her to maintain the present action. If her occupancy or possession of the premises is wrongfully invaded she can resort to the action of forcible entry and detainer as she or her predecesor in interest did as shown in Crismon v. Christmann, 44 Ariz. 201, 36 P 2d 257.
>
> The judgment of the lower court is reversed and the cause remanded with directions to dismiss the action."

The court above held that in a case where one could remove mineral, the remedy of plaintiff's was not a quiet title action but a right under the contract or an action against those interfering with said right. Plaintiff's predecessors in interest parted with their interest in the claims under the second grant, Ex. 2 and had only a conditional use for grazing purposes which is not such an interest in land as will support a quiet title action as the lower court granted.

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POINT IV.

AN ACTION UPON A CONTRACT OR TO PURSUE REMEDIES UNDER A WRITTEN LICENSE MUST BE COMMENCED WITHIN SIX YEARS.

Plaintiffs and Castagno had both actual knowledge and constructive notice of the fact that defendants leased to Ault and Ault grazed sheep on said claims since 1945. An action to recover mesne profits of real property or on a written contract must be commenced within six years.

Defendants at R 45 plead 78-12-23 U.C.A. 1953. Defendant collected rental from Ault on all claims for all years following 1945. Ault's livestock grazed all of said claims under a contract with defendants for all years since 1944. Defendants had no notice of adverse claims from Ault T155-27 or by anyone, including Castagno or Russell, T-266-11. Defendants refused to recognize Castagno after Nordell assigned to him in 1945, Entry No. 154 of the Absract, and defendants immediately leased said claims to Ault for all years following said assignment. Plaintiff's predecessors Castagno must have commenced any action within six years after Ault used said claims for grazing purposes. This is true because Castagno knew Ault was grazing sheep on said claims T46-25, and actual knowledge is even better than constructive notice, and Castagno stated Ault's sheep were there from 1945 to 1956. To recover mesne profits of real property or grazing rights if any they had, said action must have been commenced within six years.

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Moreover, said predecessors were on notice that 1/2 of the general taxes must be paid as a condition of the right to graze (Entry 106 of the Abstract) and they never paid or tendered 1/2 of the general taxes for any year since 1946 to maintain said contract in good standing; therefore their rights are lost.

POINT V.

A LICENSE IS NOT ASSIGNABLE AND DOES NOT PASS WITH THE LAND.

The instrument, Ex. 2, under which plaintiffs as the 4th assignees claim, omitted the words, "successors and assigns" with respect to plaintiff's predecessors or Grantor. Since the instrument is construed against said Grantor and most favorable to Grantee, Grantor had only a personal right to graze said claims, which right was not assignable.

33 Am Jur 403 Para. 98

> "It is an element of a license in real property that it is a personal right, and such a personal right, and such a license is, as such, incapable of being assigned or transferred by the person to whom it is granted, at least in the absence of a provision in the instrument or agreement granting the license, which authorizes assignment. It does not pass with the land."

This is not a restrictive covenant that runs with the land like the covenant in the *Sine* case 376 P 2d 940 where both parties sign a covenant that a motel will not be erected on said property where the cases have held that such a covenant runs with the

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land. Moreover, in a restrictive covenant no further performance is required by either grantor or grantee to keep the same in force. In the case at bar the grantor had only a license, not a restrictive covenant and the grantee agreed the said Grantor may use said claims for grazing purposes, provided it did not interfere with mining and grantor was to pay one-half the general taxes.

The courts hold that a restrictive covenant runs with the land. The common law holds otherwise with respect to a license. Grantee had the right to determine that other persons may be objectionable in their grazing of said claims. Since the instrument is construed against Grantors, it must be assumed that Grantee approved the right of Grantor to graze the same and reserved the right to determine whether said grazing right would or would not be recognized in subsequent assignees.

Counsel may attempt to attach some significance to the fact that Nordell, an assignee of the original Grantor was permitted to graze livestock on said claims and did pay to defendants' predecessor one-half of the general taxes for the years, 1943, 1944 and 1945. However, an assignee of a license may continue on and the licensor may accept payments from an assignee of said licensee. This does not make the license a perpetual license or is the licensor prevented from refusing to recognize any further assignments by having recognized one. Moreover, it is more significant that the defendants

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not only refused to recognize Castagno, Nordell's immediate assignee, but also refused to recognize any assignee after Nordell. Also following the assignment by Nordell, defendants' immediately leased all of said claims to Owen Ault, who grazed livestock on all claims and paid all rental thereon for all years after 1944. Castagno neither made complaints to defendants about Ault grazing sheep nor did he claim any grazing rights despite the fact that he well knew Ault was leasing said claims from defendant and grazing sheep on said claims. The only time Castagno complained to Ault was once in 1945, T 48-11, Plaintiff had the burden and did not show otherwise. The law should presume that Ault was not so stupid as to pay rental for grazing purposes for 20 years on mining claims others were grazing.

POINT VI.

NEITHER PARTY CAN ENFORCE A MUTUAL COVENANT AGAINST THE OTHER WITHOUT SHOWING PERFORMANCE OR A TENDER OF PERFORMANCE ON HIS OWN PART.

This point is copied word for word from 14 Am Jur 499 Para. 12.

Plaintiffs have the burden of proof to show performance. The claim of adverse possession as set forth as plaintiff's position in the pre-trial order is a claim of acquiring said right by hostile, adverse, possession. Such a position is repugnant to and inconsistant with specific performance or mutual performance. It also totally lacks the elements of "he

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who seeks equity must do equity" or "performance" or "showing a tender of performance" or "clean hands." Moreover, plaintiffs never did claim performance and could not when as an alternative remedy they claimed by adverse possession. Russell testified that he was acquainted with the claims for 30 years, T6-4, and that he knew of Aults operation in the area for 15 to 20 years T13-29, and Russell knew Ault leased from Bothwell. This was all before he obtained his alleged grazing rights. Russell also knew the claims were not used for mining purposes T 22-6 and that Owen Ault was leasing said claims and using the same for grazing purposes. From the record plaintiff was also charged with knowledge of the fact that to enjoy grazing rights one-half of the general taxes must have been paid to defendant. Yet he had no information concerning whether any predecessors had or had not paid one-half of said taxes, T18-13. Plaintiff never tendered any taxes or any portion of same to defendant even though he claimed to have grazed said claims for three years. Plaintiffs neither plead nor carried the burden of proof of "confession and avoidance" by confessing they owed one-half of the taxes on a plea to avoid payment. Moreover the facts neither supported a prima facie case for the relief which the court granted, nor did they show a contract if one was in force.

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POINT VII.

A PARTY SEEKING TO QUIET TITLE TO REALTY, OR REMOVE A CLOUD THEREON WILL, AS A CONDITION PRECEDENT TO THE RELIEF, BE COMPELLED TO DO EQUITY.

This point is a direct quote from 74 C.J.S. 142 Par. 94.

Plaintiffs claimed under the pre-trial order R 46, that they were entitled to possession by reason of adverse possession. Such a position supported by some evidence that they had used the land for grazing without tendering one-half of the taxes for the use they had made or will in the future make is offensive to equity or the requirement that "he who seeks equity must do equity" which should require judgment for defendants. This is particularly true where the recorder's office charges them with notice.

POINT VIII.

PAYMENT OF ALL TAXES ASSESSED AGAINST ALL MINING CLAIMS AND COLLECTING ALL RENTALL FROM A TENANT WHO USED SAID CLAIMS FOR GRAZING PURPOSES WITH NO NOTICE TO DEFENDANTS OF ADVERSE CLAIMS SINCE 1945 EXTINGUISHED ANY RIGHTS OF PLAINTIFFS AND ESTABLISHED TITLE IN DEFENDANT.

Where the owner of land leases it to a tenant who annually without interruption pays rental thereon with no complaints of any adverse claims, or others using the land since 1945, the owner is presumed to have exclusive possession, and has extinguised any rights of others whether by license contract or otherwise. Under these facts, plaintiffs and

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the predecessors must be presumed either to have *abandoned* their rights or recognized that the contract was not assignable and that they had no rights. Castagno saw Aults cattle on what he thought were the claims involved in the year 1945, T 46-22. Castagno talked with Ault at that time, and it must be presumed that Castagno either concluded he had no rights or abandoned any he had since there is no further evidence of any discussion, or complaints after 1945 by Castagno.

Moreover, where defendant has paid all taxes assessed on the claims since 1934, plaintiffs have no claim or right of any kind much less the right to enjoin this defendant from interfering with their use of said claims.

After defendants plead and proved exclusive use and collection of all the rentals on all mining claims since 1944 and proved payment of all the taxes on all mining claims since 1934, and that they had never had any notice, actual or constructive, of anyone interfering with the possessory rights of their tenant, defendant should prevail. There was direct uncontradicted evidence that defendants had no notice of adverse claims, T268-1, and there was no evidence to the contrary. In the other hand, all defendants' predecessors and the world knew defendants had leased said claims to Ault, and that Ault was using said claims for grazing purposes and paying rent to defendant for said grazing rights.

Plaintiffs not only had the burden of proof

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but also offered no proof to the contrary or offered any proof that anyone complained to defendants or their predecesors in interest or gave them any notice of any adverse claims or trespass, or that there was any reason why a reasonable person should have known of adverse claims under constructive notice, since rental was paid annually without complaint and Ault testified he never complained to defendant about Castagno being on the property, T155-27.

Defendant also plead, 78-12-5.1, 78-12-5.2, 78-12-12.1 R 21 and 78-12-12, U.C.A. 1953 R 45 which under the facts should not only prevent the relief granted plaintiff by the lower court but also establish all rights in said claims in defendant. Let the plaintiff show the court any evidence that will support plaintiffs seven years possession and payment of taxes immediately prior to the commencement of this action or at any time.

POINT IX.

A SUCCESSOR TO A GRANT IS ESTOPPED TO ASSERT ANYTHING IN DEROGATION OF THE DEED AS AGAINST A GRANTEE OR THOSE IN PRIVITY WITH HIM.

After the recording of Ex. 2 on May 24, 1934, all subsequent assignees of the Jorgensens including all of plaintiffs' predecessors in interest and plaintiffs were put on notice that there was no severence of the surface rights or use of water rights. The only right retained was a conditional license which

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was not assignable and which was conditioned upon using the land so as not to interfere with mining, and upon the payment of one-half of the general taxes.

Being on notice, plaintiffs and their predecessors could acquire no greater interest in said claims than was retained by their assignor. The point above stated was for the most part copied from 31 C.J.S. 298.

Moreover, a grantor or his successor is estopped from giving full force and effect to the conveyance. Ex. 2, See 31 C.J.S. 298. Also the statute 57-1-3 U.C.A. 1953 requires plaintiffs to regard the fee as having passed under Ex. 2 to defendants.

In addition, the third time the Jorgensens conveyed to Nordell, Entry 110 of the Abstract, both Nordell and plaintiffs were on notice that all Nordell received was "The grazing rights upon." They were then required to look to the information shown in Entry 106 of the Abstract to see how limited those rights were. They were limited to grazing only so as not to interfere with mining and grazing was permitted only upon payment of one-half of the general taxes. Moreover, said rights were not available to an assignee of grantor or a licensee as shown by the instrument itself.

POINT X.

EQUITY WILL NOT ENTER AN ORDER IMPOSSIBLE TO ENFORCE AND WHICH INVITES TRESPASS.

Ex. 18 shows that the claims involved which

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are near Mercur are scattered also see Ex. 19. Castagno admitted he had to trespass on other claims to get to the claims here involved and that said claims are, T91-18, landlocked to the plaintiffs. Plaintiffs have no right of way over the many other claims which surround said other claims here involved. The Hecla claims numbered 3079 and shown in green on Ex. 18 are immediately above the word Mercur, and are more than 1½ miles below the Black Shale claim 3029 as shown on Ex. 18, since claim 3079 extends more than half way southerly through section 5 and 3029 extends part way into section 30 two sections above. In other words, plaintiffs will be required to trespass over 1½ miles of other claims leased by Ault in order to graze the Hecla claims.

Ex. 14 is the written lease under which defendants leased 608 acres or all of the claims involved in this litigation to Owen Ault. Said lease also involved many other claims, to-wit: 2,200 acres of claims all of which are leased to Ault, which together with other claims leased by Ault from Geyser-Marion and from McCormick et al comprise a solid block which Ault has colored in green on Ex. 18. The small area of 608 acres is for the most part surrounded by other claims leased by defendant to Ault. The map Ex. 18 and the larger map, Ex. 19 demonstrate that the other claims which are not involved in this litigation and which are leased by defendant to Ault not only surround all of the claims

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near Mercur which are involved in this litigation but make it impossible for plaintif to have access to them without a trespass on defendants' other claims. This is demonstrated by the fact that plaintiff cannot get to Heclas without trespassing over the three Seal claims 3180, Annapolis 3184, Victor 3144, South Geyser, Scribner 3260, Sparrow Hawk and West Geyser 4944 which claims are leased to Ault by defendant and are not involved in this suit but which claims surround the Hecla group and with other claims leased by Ault make it impossible for plaintiff to get into graze the Hecla group without trespassing over 1½ miles of other claims leased by Ault. The plaintiff cannot have access to said claims and it is impossible for plaintiff to use same or grazing or for any other purposes without trespassing upon the other 1,593 acres of other claims leased by defendant to Ault, as well as trespassing upon about 1,000 acres of other claims leased by Ault from McCormick et al.

Plaintiffs have no contiguous or adjacent claims and no right of way to enter on said claims. Defendants will be in contempt of court if they refuse to permit plaintiff to graze said 608 acres of claims and plaintiffs will be in trespass upon said 2,500 acres, in order to graze same. This is true except only for several small claims not near Mercur but involving a small area disconnected from the Mercur area and southwest of Mercur or the southerly end by the Black Sheep claim. Should equity enter

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a decree which will invite trespass and is hopeless to enforce?

POINT XI.

A WRITTEN CONTRACT TO CONVEY REAL PROPERTY IS MERGED INTO A DEED.

The above point is copied word for word from *Knight vs. Southern Pacific*, 172 P. 693 —U—. Ex. 17 was not the contract which resulted in the deed, Ex. 2. Plaintiff did not prove that it was. The court erred in receiving it into evidence. Moreover, the court gave significant consideration to it, which was error. See R 65, where the court bases its decision on said contract and not on Ex. 2.

The photostat attached to the last cover sheet shows that the courts not only support the law as stated by the Utah Supreme Court but declare prior contracts null and void and of no further effect.

Respectfully submitted,

MARK & SCHOENHALS
E. L. Schoenhals
903 Kearns Bldg.
Salt Lake City, Utah
Attorney for
Defendant and Appellant

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⇐94 DEEDS

Md. A prima facie presumption of law arises from acceptance of a deed that it is an execution of the whole contract, and the rights and remedies of the parties in relation to such contract are to be determined by such deed and the original agreement becomes void.—Levin v. Cook, 47 A.2d 505, 186 Md. 535.

Agreement for sale of land becomes void upon execution and acceptance of the deed in pursuance of such agreement, except where the agreement contains covenants collateral to the deed or the deed appears to be only a partial execution of the contract.—Levin v. Cook, 47 A.2d 505, 186 Md. 535.

Md. Generally, by execution and acceptance of a deed in pursuance of agreement for sale of realty, such agreement becomes void, except where agreement contains covenants collateral to deed and where deed appears to be only a partial execution of the agreement.—Stevens v. Milestone, 57 A.2d 292, 190 Md. 61.

A prima facie presumption of law arises from acceptance of a deed that it is an execution of the whole contract for sale of realty, and rights and remedies of parties in relation to such contract of sale are to be determined by the deed, and the original contract becomes void.—Stevens v. Milestone, 57 A.2d 292, 190 Md. 61.

Kan. Where contract of sale of realty is carried out and a deed is delivered and accepted, articles of agreement are extinguished by deed.—Snider v. Murphy, 213 P.2d 981, 168 Kan. 459.

Kan. It is general rule of law applicable to all contracts, including deeds, that prior stipulations and agreements are merged in final and formal contract or deed executed by parties, and when a deed is delivered and accepted as performance of contract to convey, contract is presumed to be merged in deed.—Palmer v. Land & Power Co., 239 P.2d 960, 172 Kan. 231.

Articles of agreement for conveyance of land are in their nature executory and acceptance of deed in pursuance thereof is to be deemed prima facie an execution of contract and agreement thereby becomes void and of no further effect.—Palmer v. Land & Power Co., 239 P.2d 960, 172 Kan. 231.

Kan. The presumption exists that all oral understandings and agreements leading up to execution of a deed were merged in the deed. G.S.1949, 67-202.—Brungardt v. Smith, 290 P.2d 1039, 178 Kan. 629.

KNIGHT v. SOUTHERN PAC. CO. The court's ruling, however, conforms to the doctrine that, where a written antecedent contract to convey real property is merged into a deed, the grantor ordinarily must rely on the covenants contained in the deed and can-

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